SUPREME COURT, U.S.

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No. 138

In The

Supreme Court of the United States

October Term, 1956

Mineral Holding Trust of St. Paul, Minnesota, R. B. Wherry and C. A. Green,

Petitioners,

v.

Aluminum Company of America, Crown Central Petroleum Corporation, et al.

Respondents.

PETITIONERS' RESPONSE TO RESPONDENTS' REPLY TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

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No. 1029

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To The Honorable The Supreme Court of The United States:

Petitioners' case is one of a public official, or public officials, being persuaded, in the course of a private fraudulent effort to destroy petitioners' property, to take simulated official action to make it falsely appear that taxes and lien existed, and to foreclose non-existent liens, the entire procedure being conducted by not giving the required or any fair notice to petitioners. The due process issue de-

pends on the totality of the facts, which this Court's former opinions, we believe, commit it to review. Should the matter be otherwise, then the disregard of the law's rule, which we hear of in Duval County and now see apparently emerging in Jackson, may spread. The interest of all levels of society, individual and official, in the rule of law, as evidenced by the Fourteenth Amendment, and obedience to it, can only be secured in the decision of individual cases, including, we submit, the instant one.

We respond briefly under the three headings of our attack, relating them to respondents' reply, and comment on the matters of avoidance raised, principally the subject of innocent purchaser.

I. ASSESSMENT

(Respondents' Point III, pp. 11-14)

That the assessor had power and duty to assess, in the sense of commencing the assessment process and following it through in the manner required by law in conjunction with the Board of Equalization, does not, as respondents urge, avoid these facts:

(1) The assessor never followed the course of the assessment law, insofar as he was given responsibility and authority in connection therewith, in any particular.

(2) The property was never placed on any tax roll for the years in question, except for the year 1940, taxes for which year were paid.

(3) The substitute for the observance of due course of law was solely and only an informal and false statement, misleadingly placed on an official form (the form provided for notice to delinquent taxpayers) that the property was on the delinquent rolls for the years

in question. This very statement has been lost. Only a permanently filed and permanently preserved official tax roll resulting from official action by the Board of Equalization, can impose tax and fix lien.

If such radical departure from the law's mandatory course can substitute for compliance, the rule of law guaranteed by the Constitution's Fourteen Amendment and heretofore enforced by this Court is, to our view, at an end. Respondents' cases sustain no such unconstitutional procedure.

II. JURISDICTION OF THE LAND

(Respondents' Argument I, page 8)

Article 7320 was the foreclosing court's charter of power. True, the court is a court of general jurisdiction; but a court of general jurisdiction may not exercise withheld power. The statute plainly confers jurisdiction only as to lands returned delinquent on delinquent rolls. The cases cited by respondents (Note 5, page 8 of response) do not establish otherwise. Their relevance we are unable to determine, but point out in this connection that ours is a direct attack which, under the law, may be brought at any time within four years to set aside the most fair seeming judgment providing all interested in the relief sought are brought before the Court.

III. NOTICE

(Responsive to Respondents' Argument IV, pp. 14 to 20)

In this connection we call to the Court's attention a useful summary of the law announced by this Court in this connection, a case note, "Requirements of Notice in In Rem Proceedings", *Harvard Law Review*, Vol. 70, No. 7, page 1257.

The issue is, not whether the Supreme Court of Texas has final power to interpret its rules, but, whether it can permit property to be destroyed by procedures which, clearly, were not those prescribed.

Mineral Holding Trust's deed record address was known. Its address was on the tax records. The law in effect required attempt and failure at personal service before publication notice was authorized. It also required affidavit that the address could not be found after diligent inquiry. There was complete disregard of the law's command and no reasonable notice in fact.

We do not have the issue of whether publication notice would have sufficed if the circumstances had been such as authorized it under the rules. If the circumstances had authorized such publication service under the rules, there would still be a most serious question of its validity at the present time. Means of communication and travel now available make Minneapolis as accessible now to Houston as two parts of the same city were to each other a hundred years ago. After such changes, what is reasonably to be required to give fair notice may be radically different now from what would have been required when personal notice across long distance was impracticable, if not impossible. We believe we detect recognition of this latter thought in the later opinions of this Court. Certainly it is recognized in the changes in our Texas rules which were so flagrantly disobeyed in this cause. Publication was always a misgrable substitute for personal service.

In this connection and others, respondents argue "Practicalities". The law was simple; its command clear. Did "practicalities" authorize the County Attorney to disobey the law because in his private opinion, as he expressed it, he concluded that attempt at personal service, required by law, would not have been effectual? Respondents seem to

argue that a public official is entitled to judge for himself whether he will obey the law. Such "practicalities" are not, we submit, a part of the American system. Once Legislation exists, only the Legislature or authorities acting pursuant to its direction, can abrogate or suspend its provisions.

Respondents' argument that Rule 117a was amended, effective subsequent to the filing of this suit, has no bearing, we submit. In this connection other "practicalities" are advanced. If they were relevant, we would point out that the very statement handed the tax assessor showed the years for which taxes were paid. A simple look at the records for those years would have shown Mineral Holding Trust's St. Paul address, and pointed to the receipt which paid 1940 taxes as well.

IV. INNOCENT PURCHASER DOCTRINE

(Respondents' Argument II, pages 8-11)

As we read the Constitution, its protection is not "except when the rights of third parties have intervened". As we read the Fourteenth Amendment, it is a prohibition against the taking of anyone's property without due process; and if property is not taken by lawful means, it is difficult to see that any third parties' rights can intervene and become superior.

A void judgment by definition cannot destroy property rights. Texas Courts have required that in some cases void judgments must be directly attacked, that is when the judgments are fair seeming and regular upon their face. If a void judgment is not subject to some kind of attack, property would be subject to being taken without due process. Ours is a direct attack and the "innocent purchaser's" "equity" is merely to be made whole to the extent he or it has benefitted the owner. *Harrison* v. *Sharpe*, 210 S.W. 721, *G.H.&S.A.* v. *Blakeney*, 73 Tex. 180.

We appealed to a court of equity and offered to do equity. We also appealed to a Court of law and pleaded for our legal right. Ours is a blended system. We plead the facts and are entitled to the relief the law allows.[1] The point is further emphasized in Rule 51, and in many decisions announced before and after the Rules of Civil Procedure were adopted. In the interest of time we do not quote Rule 51 or refer to any of the other authorities for a point so elemental and generally known. We are entitled to our rights at law; and we have here stripped our case to the stark essentials which we believe constitutionally require under the Constitution itself, regardless of law or equity, the return of our property at the hands of this Court.

For the Court's benefit, if contrary to our view such matters are considered relevant, we will catalog some of the matters which respondents, Alcoa and Crown, were, we submit, charged with knowing when they purchased:

(1) That the Constitution and Statutes (quoted by respondents) under which they purchased, made their title vulnerable for fraud if in fact (as it did) fraud created their title.

(2) That the laws of Texas permit even a perfect appearing judgment, void in fact, to be set aside by direct attack instituted in four years.

(3) That the foreclosure judgment (Tr. 55) did not name in its body any defendant.

(4) That the foreclosure judgment adjudicated a legal impossibility, namely, that taxes were delinquent,

[1] Rule 48, *Texas Rules of Civil Procedure*, reads:

"A party may set forth two or more statements of a claim or defense alternatively or hypothetically, either in one count or defense or in separate counts or defenses. When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may also state as many separate claims or defenses as he has regardless of consistency and whether based upon legal or equitable grounds or both."

and that no liability for penalty, interest or costs existed (see opinion of Court of Civil Appeals on this).

(5) That Mineral Holding Trust was, as its name indicated, a trust, and that its deed record address was St. Paul, Minnesota.

(6) That the judgment on its face showed that taxes for some years had been paid and that accordingly some address for Mineral Holding Trust must appear on the tax records.

(7) That notwithstanding that when any address appeared on the tax records under the governing law, attempt at personal service, failure at such attempt, and affidavit proof of such attempt and failure, must appear as a prerequisite to notice being given by publication.

(8) That in fact no attempt at personal service had been made and no affidavit of attempt and failure was in the record.

(9) That the record showed a clumsily defective affidavit for publication. (See Court of Civil Appeals comment on this.)

(10) That the foreclosure was as for taxes on the delinquent rolls and that if there were any such a look at the public records would disclose their existence or non-existence.

(11) That Stovall and Appling had bought valuable lands for a pittance and that to attempt to purchase and hold a title so purchased would itself be fraud on the part of Alcoa and Crown under Texas authority (Reply, page 9).

In the face of these considerations, if relevant, we would have to weigh the agreement between respondents that the property would not be developed within the redemption period (to do nothing to call the matter to Mineral Holding

Trust's attention). Also respondents "cured" their other tax titles in their blocks but never sought to make contact with Mineral Holding Trust. This agreement and this conduct would have to be weighed on the background of the fact that Appling was agent for Aluminum Company of America in assembling the block, was himself a large landowner in the block, and shared in the ownership of oil rights procured by lease under his agreement with Aluminum Company of America.

V. RESPONDENTS' ARGUMENT THAT WHERRY AND GREEN ARE NOT ENTITLED TO ASSERT THEIR RIGHTS AS ASSIGNEES

(Respondents' Argument V, pp. 20-23)

An assignee or vendee stands in the shoes of his assignor or vendor. The power to pass one's entire right is an important aspect of "property". To argue that Mineral Holding Trust could not be deprived of its property, but could not pass unimpaired an interest in it, is to say that that the void judgment destroyed Mineral Holding Trust's *jus disponnendi*. Petitioners together assert the entire right which Mineral Holding Trust could have asserted had it never sold part of its right to Wherry and Green.

Also Mineral Holding Trust has never sold its minerals to Respondents. Is not the right not to sell, equally with the right to sell or even to give, a right of property? No Court has the right to make conveyances for Mineral Holding Trust, or to question its valid conveyances. It is itself satisfied with its transaction with Wherry and Green, and says that without their assistance no part of this property would have been recovered.

Respondents' criticism of the dealings between Petitioners is, we submit, irrelevant. Those dealings are of concern only to Mineral Holding Trust and Wherry and Green. They have not affected respondents. If the matter

is considered otherwise, Mineral Holding Trust, here repeats for itself that, in all particulars, there was on the part of Wherry and Green fair dealing and full disclosure of all material facts, and that it is satisfied with its bargain and desires its conveyances to be respected, and its right to choose its lessee and operator. If relevant, it can and will justify the choice on economic and other grounds. Petitioners suggest that nothing in the record actually appearing is contrary to these statements, despite the uncharitable speculative conclusions with which respondents are free.

Respondents contend that we affirm the tax judgment in our pleading. Alternative pleading is permitted under our rules, even inconsistent pleading; and we are puzzled to know how it can be said that in a pleading which forcefully asserted that taxes were non-existent and the foreclosure judgment was void there can be found an affirmance of the tax judgment. No Court below so regarded the matter.

Neither *Brown* v. *Bonougli*, nor any consideration of efficiency, should turn officials and courts loose to impose taxes and affix liens except by course of prescribed law and upon notices which are required and which are fair. The statutes we have quoted are the controlling statutes. The suit was necessarily controlled by them. The Act of 1937 (Respondents' Appendix, p. 37) was merely regulation of proceedings under, and was not repeal, of Article 7320 or other articles we advert to in our petition. Its provisions do not alter the necessary result in this cause.

CONCLUSION

Our case presents a fraudulent simulation of tax liability, tax lien, foreclosure jurisdiction and foreclosure sale, all under the facts without the due process of the law as Constitutionally and Statutorily prescribed. The dissenting minority of three in the Supreme Court summarized our case so much better than we have been able to do that we respectfully request the Court to read that summary ap-

pearing on pages 110 and 111 of our petition's Appendix.

We respectfully repeat our prayer that we be allowed to present to this Court the full record and fully to brief the facts and the issues.

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R. B. Wherry and
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PROOF OF SERVICE

I, Joyce Cox, one of the attorneys for Petitioners herein, and a member of the bar of the Supreme Court of the United States, hereby certify that on the 12th day of July, 1957, I served copies of the foregoing Petitioners' Response to Respondents' Reply to Petition for Writ of Certiorari to the Supreme Court of Texas on respondents as follows:

Upon Aluminum Company of America and Crown Central Petroleum Company by delivering copies to Hon. Tarlton Morrow of the firm of Vinson, Elkins, Weems & Searls at his office in the Esperson Building, Houston, Texas.

By mailing copies to the Hon. Frank Guittard, Guittard & Henderson, P. O. Box 586, Victoria, Texas, they being attorneys of record for Guy F. Stovall and F. E. Appling.

Joyce Cox

JOYCE COX.

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WAIVER BY STOVALL AND APPLING OF RIGHT TO FILE BRIEF

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WAIVER BY STOVALL AND APPLING OF RIGHT TO FILE BRIEF

To The Honorable Supreme Court of the United States:

Come now Guy F. Stovall and F. E. Appling, two of the respondents, and waive their right to file a response to the Petition for Writ of Certiorari in the above entitled case, and say:

As shown in the judgment of the Court of Civil Appeals (Petition for Writ, pages 94-95), and in the opinion of the Texas Supreme Court (Petition, page 108), settlement was made between these respondents, Stovall and Appling, on

the one hand, and all of the petitioners on the other hand. In light of such settlement, Stovall and Appling are not further affected by the litigation and hence waive any right to file either a reply or a brief in response to the Petition for Writ of Certiorari.

Respectfully submitted,

GUY F. STOVALL
F. E. APPLING

Respondents

By C. C. CARSNER,
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Proof of Service

I, C. C. Carsner, one of the attorneys for respondents, Stovall and Appling, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the .... day of July, 1957, I served copies of the foregoing Waiver on Petitioners, Wherry and Green, by mailing copies to Knox W. Gilmore and W. J. Barnes, at 415 Texas National Bank Building, Houston 2, Texas, and to Joyce Cox at 2828 Gulf Building, Houston 2, Texas, and to John E. Daubney, Pioneer Building, St. Paul, Minnesota, and John W. Stayton, Capitol National Bank Building, Austin, Texas; and that I served copies of the foregoing Waiver on the other Respondents, Aluminum Company of America and Crown Central Petroleum Corporation, by mailing copies to Gordon Stokes, Tarlton Morrow, C. E. Bryson and Vinson, Elkins, Weems & Searls, Esperson Building, Houston 2, Texas.

Charles C. Carsner

C. C. Carsner